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Supreme Court, U.S.
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No. 94-145

In The

Supreme Court of the United States

October Term, 1994

CATHEDRAL OF JOY BAPTIST CHURCH and REVEREND SAMUEL E. HINKLE,

Petitioners,

v.

VILLAGE OF HAZEL CREST, a municipal corporation, and DIANNA J. CHALMERS, RICHARD J. HEBDA, JOHN E. KAINDL, RONALD J. KELLY, JAMES A. LABEAU, KATHLEEN WITT, individually and as agents of the Village of Hazel Crest,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

Respondents Village of Hazel Crest, Illinois, *et al.*, oppose issuance of a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this proceeding. Petitioners' brief in support of their Petition for Writ of Certiorari is replete with misstatements and misrepresentations of facts, law and prior proceedings. Counsel for respondents are, therefore, obligated to present this Brief in Opposition. S.Ct. Rule 15.1.

OPINION BELOW

Petitioners' brief misstates the Opinion of the Court of Appeals for the Seventh Circuit in this proceeding. The reprinted Opinion in the Appendix to Petitioners' brief does not reflect the Order issued by the Court of Appeals on May 13, 1994, which amended the Opinion issued April 22, 1994. That Order is reprinted in the Appendix to this Brief at A-1, and the full, corrected text of the footnote which that Order amended is reprinted at A-2. The amended Opinion of the Court of Appeals is correctly reported at *Cathedral of Joy Baptist Church v. Village of Hazel Crest*, 22 F.3d 713 (7th Cir. 1994).

STATEMENT OF THE CASE

This is a purported civil rights action brought by the Cathedral of Joy Baptist Church and Reverend Samuel E. Hinkle (hereinafter jointly referred to as "Cathedral")

against the Village of Hazel Crest and its six trustees, both individually and as agents of the Village (hereinafter collectively referred to as the "Village"), for not issuing a special use permit allowing Cathedral to turn a commercially-zoned Ponderosa Restaurant building into a church. Cathedral submitted its application for a special use permit to the Village on April 1, 1988. (R.73, p.3, ¶1, R.80, Ex.A) Subsequently, the Village's Plan Commission and Zoning Board of Appeals held public meetings and a hearing at which Cathedral and its attorney were present and participated. (R.80, Ex.E, F). Both the Plan Commission and the Zoning Board recommended that Cathedral's application be denied. *Id.* The full Board of Trustees of the Village then reviewed Cathedral's special use application, first at a regularly-scheduled, open, public administrative ("Committee of the Whole") meeting on June 21, 1988, which Cathedral and its attorney attended, (R.80, Ex.H, pp.1-3) and a week later at a regularly-scheduled, open, public Village Board meeting on June 28 at which the Trustees took formal, final legislative action to deny Cathedral's special use application. (R.80, Ex.N, pp.2-3)

More than two years after the Village Board took open, formal, final legislative action denying Cathedral's special use application, Cathedral filed its first complaint in this case, alleging that the Village's denial discriminated against Cathedral on the basis of race and religion. (R.1) In response to Cathedral's second amended complaint, the Village filed a motion to strike and dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (R.28) In addition to challenging the legal basis of each count of the second amended complaint, the

Village's motion also asserted, as an affirmative defense, that Cathedral's initial complaint was not filed within the two-year period allowed by the applicable statute of limitations. (R.28, Def. Memo, pp.2-3)

Then District Judge Ilana Diamond Rovner referred the Village's motion to Magistrate Bernard Weisberg for review and recommendation. (R.49) Magistrate Weisberg recommended that the Village's motion to dismiss be continued generally, that a motion for summary judgment be filed on the statute of limitations defense, and that discovery be limited to the statute of limitations issue. (R.58) Judge Rovner adopted the report and recommendation of the Magistrate. (R.70, 71) Cathedral and the Village then brought and briefed cross-motions for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. (R.73, R.77) Those motions were referred to Magistrate Weisberg. (R.72)

The Magistrate's report on the motions for summary judgment found that the applicable statute of limitations period began to run on the day the Village Board of Trustees formally denied Cathedral's special use permit application, and that Cathedral did not file its initial complaint in this case until after the applicable two-year limitations period had run. (R.43) The Magistrate recommended that the Village's motion for summary judgment on its statute of limitations defense be granted, and that Cathedral's summary judgment motion be denied. (R.94)

District Judge Paul E. Plunkett, to whom this case had been assigned following the elevation of Judge Rovner to the Court of Appeals, affirmed and adopted

the Magistrate's report and recommendation, additionally noting that Cathedral's purported injury accrued on the date on which the Village Board voted because the result of that vote was readily available to Cathedral, and Cathedral was on notice that what it considered to be an injury was likely to occur. (R.108)

Cathedral appealed the District Court's decision to the Court of Appeals for the Seventh Circuit. On April 22, 1994, a panel of the Seventh Circuit, consisting of Chief Judge Posner, Judge Coffey, and Judge Kanne, issued a decision affirming the District Court's grant of summary judgment in favor of the Village because Cathedral did not meet the reasonable diligence requirement of the "discovery rule", and because application of the "discovery rule" is inappropriate in cases where the injury complained of is the decision of a municipal body made at a scheduled public meeting. *Cathedral of Joy v. Village of Hazel Crest*, 22 F.3d 713 (No. 93-1225, 7th Cir. Op. dated April 22, 1994 and amended by Order dated May 13, 1994).

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT RAISE THE QUESTIONS PRESENTED IN THE PETITION.

A. The "Discovery Rule" Was Properly Stated and Applied.

The first Question Presented in the petition (pp.i, 3) is whether a Circuit split was created by the Seventh Circuit's purported holding that the "discovery rule", as

applied in race discrimination actions arising under 42 U.S.C. §1983, requires that the applicable statute of limitations begin to run when the claimant "anticipates" injury, as opposed to when the claimant should reasonably discover such injury. This mind-boggling concept is nowhere stated, or even suggested, in the Seventh Circuit's decision below. The Court's decision does not indicate or imply in any manner that the discovery rule is or should be applied differently in race discrimination actions arising under Section 1983 than in any other civil action. Furthermore, the Seventh Circuit does not in any way state, indicate or suggest that the discovery rule requires that the applicable statute of limitations begin to run when the claimant "anticipates" that he will be injured rather than when he should have reasonably discovered his injury.

The rule of law applied by the Seventh Circuit in this proceeding is clearly stated in its decision:

> The "discovery rule," which is read into state statutes of limitations in federal question cases, postpones the beginning of the limitations period of a federal claim from the date the party is injured to the date when the party discovers or should have discovered the injury, exercising reasonable diligence. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2916, 115 L.Ed.2d 1079 (1991); *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990).

22 F.3d at 717. The same standard for the "discovery rule" is applied in all the circuit court cases cited by petitioners. *See, Morse v. University of Vermont*, 973 F.2d 122, 125 (2nd Cir. 1992); *Rivera-Muriente v. Agosto-Alicea*, 959

F.2d 349, 353 (1st Cir. 1992); *Vernow v. Vicks Market*, 896 F.2d 43, 46 (3rd Cir. 1990); *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987); *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1384 (10th Cir. 1985); *Marrapese v. State of Rhode Island*, 749 F.2d 934, 936 (1st Cir. 1984); *McWilliams v. Escambia County Sch. Bd.*, 658 F.2d 326, 330 (5th Cir. 1981); *Lavellee v. Listi*, 611 F.2d 1129, 1131 (5th Cir. 1980).

Obviously, the decision below does not create any split among the Circuits as to the substance of the discovery rule. If it were the intent of the Seventh Circuit to hold that the applicable statute of limitations period begins to run when a claimant "anticipates" that he will be injured, rather than when the purported injury is or can be discovered, then it would have held that the statute of limitations period began to run on the date of the administrative meeting of the Village's Board of Trustees, at which time four of six Village Trustees directly stated to Cathedral's representatives that they did not favor Cathedral's request for a special use permit (R.80, Ex.H, pp.1-3). Indeed, if the Seventh Circuit wanted to apply an "anticipation" standard, it could have ruled that the applicable statute of limitations period began to run when one or both of the Village's advisory boards which reviewed Cathedral's special use request had recommended denial (R.80, Ex.D, p.2, Ex.F, p.44).

Rather, the Seventh Circuit held, contrary to petitioner's contentions, that Cathedral's purported injury occurred on the date the Village's Board of Trustees took final, formal legislative action denying Cathedral's special use application at an open, regularly-scheduled public meeting on June 28, 1988. 22 F.3d at 717. Further, the

Seventh Circuit held that Cathedral should have discovered its purported injury on that date because Cathedral was on notice that a final, formal adverse action on its special use application was imminent, and because, as the record below clearly shows, Cathedral's representatives were personally informed at the Village Board's administrative meeting that action would be taken on the application at the "next regular Board Meeting" to be held on June 28, 1988 (R.80, Ex.H, pp.1-3). 22 F.3d at 718.

The Seventh Circuit's application of the discovery rule in this proceeding is neither unjust nor contrary to the application of the discovery rule by other Circuits. As pointed out in the decision below:

> The discovery rule is an exception to the time-bar provision. Thus [Cathedral] has the burden of showing that it falls within the exception by demonstrating that even with the exercise of reasonable diligence, it could not have known of the purported injury inflicted by the Village on the 28th of June, 1988.

22 F.3d at 717, citing *Clift v. United Auto Workers*, 818 F.2d 623, 629 (7th Cir. 1987), *rev'd and remanded on other grounds*, 488 U.S. 1020, 1025 (1989); *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986). The Ninth Circuit has stated that when factual information indicating or demonstrating a litigable injury is publicly available, and a would-be plaintiff is on notice of facts that would excite its inquiry, then that plaintiff is deemed to have knowledge of the injury. *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 858 F.2d 499, 503-04 (9th Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989). As pointed out by the Court of Appeals for the Fifth Circuit, the standard of reasonable diligence:

> imposes an affirmative duty on the potential plaintiff. Plaintiff is not permitted a "leisurely discovery of the full details of the alleged [injury]". [Citation omitted.] A plaintiff who has learned facts that would cause a reasonable person to inquire further must proceed with a reasonable and diligent investigation, and is charged with the knowledge of all facts such an investigation would have disclosed.

Jensen v. Snellings, 841 F.2d 600, 607 (5th Cir. 1988). Hence, no Circuit split in the application of the discovery rule has been created by the decision below.

This is not a case where the purported injury consisted of a decision made by a committee at a private meeting which the claimant could not attend, which was the case in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Nor is this a case where the purported injurious decision was made by a single individual administrative official in the confines of his office, and therefore could not immediately be known by the claimant, as was the case in *Morse v. University of Vermont*, 973 F.2d 122 (2nd Cir. 1992).

The supposed injurious legislative action taken against Cathedral was taken at a regularly-scheduled, open, public Village Board Meeting, of which Cathedral's representatives were put on notice. Pursuant to the Illinois Open Meetings Act, 5 ILCS 120, the schedule of regular meetings of the Village Board of Trustees was set and published early in the calendar year (R.80, Ex.L). Furthermore, notice of the April 28, 1988 Village Board Meeting was posted at the Village Hall and published in a local newspaper several days in advance. All citizens,

including Cathedral's representatives, were therefore informed as to when the Village Board would take official action.

As this Court has pointed out on more than one occasion, all citizens are presumed to know of legislative actions which affect their interests. *Hodel v. Irving*, 481 U.S. 704, 733 (1987) (J. Brennan concurring); *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman, et al.*, 268 U.S. 276, 283 (1925). This presumption is particularly appropriate in a case such as the instant one where the legislative action complained of was the culmination of a legislative process which the claimant initiated by petitioning for a special use approval, and in which claimant participated. It was not an action which was unexpected or in which Cathedral had no involvement, or which was in any way hidden from claimants' immediate and first-hand knowledge.

The outcome in the case at bar is substantially similar to that in *Peter Henderson Oil Co. v. City of Arthur, Texas*, 806 F.2d 1273 (5th Cir. 1987), which was cited by the Seventh Circuit in its May 13, 1994 Order amending its April 22, 1994 Opinion in this case (the Order which, as noted above, petitioners failed to notify this Court of). In *Henderson Oil*, the claimant had sought a specific zoning approval from the defendant municipality that would allow drilling for oil at a particular location. The zoning approval was granted, but with a condition which the claimant found objectionable. Nevertheless, the claimant did not seek to challenge the constitutionality of the objectionable condition until more than five years later. The court found that the applicable statute of limitations provided a two-year period in which to bring a federal

civil rights action pursuant to 42 U.S.C. §1983. The court then noted the general discovery rule that "Section 1983 actions accrue when the injured party knows or has reason to know of the injury which forms the basis for the action," 806 F.2d 1275, and went on to hold that the claimant was given explicit, unambiguous notice of the objectionable condition on the date the ordinance was passed by the city council. Its claim was, therefore, time-barred. *Id.*

B. Summary Judgment Was Properly Granted.

The second question presented by petitioners (pp.i, 10) is whether the Seventh Circuit's application of the summary judgment standard in its decision below is inconsistent with the application of the same standard by other Circuits. Specifically, petitioners charge that the Seventh Circuit ignored material issues of fact that exist in the record. This contention is without merit and belies petitioners' positions and arguments in prior proceedings in this matter.

As petitioners point out in their brief, Cathedral was the first party to move for summary judgment on the Village's statute of limitations defense. In the memorandum in support of that motion, Cathedral contended, as it does in its brief to this Court, that affidavits of Cathedral's representatives and affidavits of the Village's Trustees conflict as to whether Cathedral was given personal notice of the April 28, 1988, meeting of the Village Board at which final legislative action was taken on Cathedral's application for a special use. Nevertheless, in its memorandum in support of its motion for summary

judgment, Cathedral stated: **"This factual controversy, however, is not material"** (R.73, p.2). Cathedral went on in its memorandum to state, *arguendo*, that "Cathedral was aware that its special use request was on the agenda of the Board Meeting scheduled at 8:00 p.m. on July 28, 1988" (R.73, p.3). For Cathedral to now suggest to this Court that a controversy exists as to a genuine issue of material fact is utterly without credibility.

In the context of the summary judgment motion on a statute of limitations defense, the plaintiffs' burden is to present evidence sufficient to allow a jury to return a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). This Court has made it clear that the "plain language of Rule 56(e) [of the Federal Rules of Civil Procedure] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party . . . bear[s] the burden of proof. . . . In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

As previously noted, petitioners have conceded that there is no genuine issue of material fact in this case. Thus, the Seventh Circuit, on *de novo* review, was justified in determining whether the Village was entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986). The Seventh Circuit fairly held that, based upon the undisputed material facts, Cathedral had not exercised reasonable diligence, and therefore had

not met its burden of showing that it came within the discovery rule exception to the applicable two-year statute of limitations. 22 F.3d at 719.

Petitioners' suggestion that Cathedral did not have reason to suspect that the Village's Board of Trustees would deny its application for a special use at the June 28 meeting because "Cathedral just as easily could have anticipated there was a chance that at least one Trustee would change his mind, **leaving the vote tied and sustaining their application**" (Pet.Br., p.14, emphasis added) is a false and absurd statement. Under Illinois law, a proposed special use which fails to receive the favorable recommendation of a Plan Commission must be approved by "a favorable majority vote of all . . . trustees of the municipality then holding office". 65 ILCS 5/11-13-1.1. Thus, it would have taken the favorable vote of four of six of the Village's Trustees in order for Cathedral's application for special use to be approved. A tie vote would not have "sustained" Cathedral's application. Furthermore, petitioners point to nothing in the record that indicates one or more of the Village Trustees adverse to Cathedral's application was likely to change his or her mind.

Likewise, petitioners' argument that it could be reasonably inferred that Cathedral could have anticipated receiving written notice of the June 28, 1988, meeting of the Village Board is without credibility. As pointed out by the Seventh Circuit, Cathedral had received written notice of only two of four prior meetings with Village bodies (22 F.3d at 718). That is hardly a record worthy of reliance. Additionally, as noted above, Cathedral has conceded that any factual controversy as to whether it was

given notice of the June 28, 1988 meeting of the Village Board "is not material" to the determination of the issues in this case. Thus, it was completely fair and reasonable for the Seventh Circuit to conclude that reasonable diligence was not exercised by Cathedral's representatives by waiting to receive such a notice. 22 F.3d at 719.

II. THE SEVENTH CIRCUIT'S DECISION IS PLAINLY CORRECT AND SHOULD NOT BE REVIEWED.

Statutes of limitation represent a legislative judgment which affords plaintiffs a reasonable time to present their claims, while protecting defendants and the courts from having to deal with cases in which the search for the truth may be seriously impaired by the loss of evidence, disappearance of witnesses, fading memories and disappearance of documents. *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Statutes of limitation are to be strictly construed. *Id.*, 444 U.S. at 117-18. The applicable limitations period in this case was not a term of days or months. Rather, it was a term of years. What Cathedral is requesting, in essence, is that the running of the applicable limitations period be tolled for a day. While the request may seem minor, it is important to note, as District Judge Plunkett did below, that Cathedral had two years in which to file a complaint, and it failed to do so.

To hold that the statute of limitations period for a claim stemming from a legislative action does not begin to run until the affected party obtains specific knowledge of that action will effectively give the affected party discretion to determine when its cause of action accrued,

particularly when, as in the instant case, the legislative body had no obligation to give specific notice of its action to the affected party. In the instant case, one of Cathedral's representatives, Reverend Hinkle, avers that he learned of the Village Board's denial of Cathedral's special use request from a newspaper article he read on July 1, 1988 (R.80, Ex.I, ¶9). What if he had not bothered to read that article or otherwise inform himself of the Village Board's action until the following day? Or the following month? Or the following year? Cathedral's contention is that it could delay the accrual of its purported cause of action until it chose to inform itself that the Village Board denied its application. This contention is contrary to the purpose of statutes of limitation.

As the Seventh Circuit pointed out in a footnote to its decision in this case (a footnote which petitioners did not properly restate in the appendix to their brief, but which is properly restated in the appendix to this brief), the "discovery rule" really has no applicability in this case because

> [t]here was, in fact, nothing to be "discovered." Here, a matter of public concern (the special use permit) was submitted by an applicant for consideration by municipal bodies at successive public hearings. The date for final determination was announced publicly and set for a regularly-scheduled meeting – a fact which appeared in the news media. The action was taken at the date and time previously announced to the public. In the absence of any effort by the municipal body to take action in a secretive or clandestine manner out of public hearing, or to otherwise hide its actions from the applicant, there was nothing to discover.

22 F.3d at 719, n.1.

It simply cannot be a hardship for the proponent of a zoning petition before a municipality to actively monitor its progress, any more than it is a hardship for a proponent of a legal claim to actively monitor the time and place of judicial proceedings thereon. In this case, Cathedral's representatives, one of whom was an attorney specifically retained for this purpose, were remiss in not actively following the progress of their application before the Village to its final conclusion. Cathedral now seeks to lay blame on the Village for the carelessness and neglect of its representatives. To do so would be improper and unjustified.

CONCLUSION

The Seventh Circuit properly applied the "discovery rule" and the standards for summary judgment in this case. A correct and just result was reached. Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

May 13, 1994.

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

CATHEDRAL OF JOY BAPTIST CHURCH and REVEREND SAMUEL E. HINKLE, Plaintiffs-Appellants,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 93-1225 vs.	No. 90 C 3738
VILLAGE OF HAZEL CREST, a municipal corporation, and DIANNA J. CHALMERS, RICHARD J. HEBDA, JOHN E. KAINDL, RONALD J. KELLY, JAMES A. LABEAU, KATHLEEN WITT, individually and as agents of the Village of Hazel Crest, Defendants-Appellees.	Paul E. Plunkett, *Judge*

ORDER

It is hereby ORDERED that the opinion in this case issued April 22, 1994, is amended as follows:

On page 11, footnote 1, lines 12 and 13, "Although not a legal argument advanced by the Village in this case, perhaps" is stricken and replaced by "Perhaps". Also at the end of footnote 1 inset "*See, Peter Henderson Oil Co. v. City of Port Arthur, Tex.*, 806 F.2d 1273, 1275 (5th Cir. 1987)."

The amended footnote reads as follows:

1. Taking a more fundamental view, in cases such as the one before us it would appear that the discovery rule may actually be inapplicable. There was, in fact, nothing to be "discovered." Here, a matter of public concern (the special use permit) was submitted by an applicant for consideration by municipal bodies at successive public hearings. The date for final determination was announced publicly and set for a regularly scheduled meeting – a fact which appeared in the news media. The action was taken at the date and time previously announced to the public. In the absence of any effort by the municipal body to take action in a secretive or clandestine manner out of public view or to otherwise hide its action from the applicant, there was nothing to discover. Perhaps a "bright line" rule would be more rational. Under such a theory a legal claim based on a decision of a municipal body made at a scheduled public meeting would accrue at the time the public action is taken. *See, Peter Henderson Oil Co. v. City of Port Arthur, Tex.*, 806 F.2d 1273, 1275 (5th Cir. 1987).